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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Jones versus Bock, and Williams versus Overton. Mr. Andre.

ORAL ARGUMENT OF JEAN-CLAUDE ANDRE
ON BEHALF OF THE PETITIONER

MR. ANDRE: Mr. Chief Justice, and may it please the Court:

In these three cases, each of the three petitioners filed administrative grievances with the Michigan Department of Corrections. The Michigan Department of Corrections conducted investigations and issued final decisions on the merits of petitioner's grievances. Nevertheless, a year and a half later, each of the petitioner's complaints was thrown out of federal court without leave to amend because petitioners failed to satisfy on of the Sixth Circuit's judge-made corollaries to the PLRA's exhaustion requirement. None of those three corollaries find any meaningful support in the Federal Rules of Procedure, in fact they contradict the federal rules. Nor do they find any support in administrative law or habeas law, the two areas of law to which this Court looks for guidance in interpreting administrative litigation and format.

1 Finally, the overwhelming majority of the circuits that
2 have considered these questions have rejected them all.

3 I'd like to begin with the heightened
4 pleading rule that the Sixth District applied here. The
5 Federal Rules of Civil Procedure require a plaintiff to
6 simply provide a short claim statement of the basis on
7 which his or her claim will lie. The Federal Rules of
8 Civil Procedure do enumerate certain kinds of
9 allegations that a plaintiff must plead with
10 specificity, those are enumerated in Federal Rule of
11 Civil Procedure 9(c), but exhaustion is not one of them.
12 Accordingly --

13 JUSTICE KENNEDY: Suppose the district court
14 finds that in its experience, 80 percent of the claims
15 are ones that are unexhausted, just assume that. And
16 the district court said, the only way I can figure out
17 the good 20 percent from the 80 percent that are going
18 to ultimately be dismissed is to have a motion for a
19 more definite, an order for a more definite statement,
20 because I'll do it sua sponte under 12(e), I think. Can
21 the district court do that?

22 MR. GRANT: I think that would be correct,
23 and that would be consistent with the Court's habeas
24 jurisprudence.

25 JUSTICE KENNEDY: The court could ask for a

1 pleading which set forth the facts of exhaustion?

2 MR. ANDRE: I believe that's true.

3 JUSTICE KENNEDY: Then why isn't this --
4 this is just the same if the court has said, you know,
5 in order to make our screening function efficient, we
6 just have to know about exhaustion.

7 MR. ANDRE: Well, first of all, when
8 Congress created the various screening provisions in the
9 PLRA, it noticeably omitted exhaustion. It clearly had
10 exhaustion in mind when it enacted the PLRA. The term
11 "exhaustion" appears in 42 U.S.C. 1997 --

12 JUSTICE KENNEDY: How about, what, if you
13 concede the district court could do it in individual
14 cases or in most cases, why can't the Sixth Circuit do
15 it? That's my question.

16 MR. ANDRE: Well, what sets the Sixth
17 Circuit's rule apart from I think the hypothetical you
18 propose, and also from this Court's habeas jurisprudence
19 is that in both of those scenarios the plaintiff, the
20 prisoner, is given a chance to respond. In the Sixth
21 Circuit, if they don't they don't satisfy the heightened
22 pleading rule at the minute that they file their initial
23 complaint, they are out. There is no leave to amend,
24 and that's what happened in this case.

25 In Petitioner Jones' case, he filed the

1 complaint and he actually did allege that he exhausted
2 his administrative remedies. He said: I exhausted my
3 administrative remedies, I filed my step one grievance
4 on this date, I received a denial on that date, and he
5 went down the list through all three steps.

6 JUSTICE ALITO: The briefs point out that a
7 number of district courts have form complaints that are
8 often used in these cases and that these forms call on
9 the prisoner-plaintiff to address the issue of
10 exhaustion. Now, do you think there's something wrong
11 with those forms, and if a prisoner fills out the form
12 and reveals in filling it out that a claim was not
13 exhausted, is it improper for the district court at the
14 screening stage to dismiss the case?

15 MR. ANDRE: With respect to the form, I
16 don't think that the form is improper, but I think it
17 would be improper for a court to dismiss the prisoner's
18 case if the prisoner failed to fill out the section of
19 the form that asks him about exhaustion because
20 exhaustion is an affirmative defense in both
21 administrative law and habeas, and there's no indication
22 in this statute that Congress --

23 JUSTICE ALITO: If it's an affirmative
24 defense, then why is it -- why is it proper for a
25 district court, for a district court, to have a form

1 that calls on the plaintiff to negate the affirmative
2 defense?

3 MR. ANDRE: I think the district court can
4 ask the plaintiff pretty much whatever the district
5 court likes. But whether the district court could,
6 could dismiss a case for failure to comply, failure to
7 respond to that question, that's another matter.

8 CHIEF JUSTICE ROBERTS: Well, we know under
9 the statute they can dismiss a case because it's
10 frivolous, right?

11 MR. ANDRE: Absolutely.

12 CHIEF JUSTICE ROBERTS: Regardless of the
13 substance of the claim on the merits, if you know that
14 you've just ignored the exhaustion requirement isn't
15 that a frivolous claim?

16 MR. ANDRE: We would certainly concede that
17 if it is clear on the face of the complaint that a
18 prisoner has not exhausted his or her administrative
19 remedies then that claim can be dismissed. I guess the
20 way it would operate -- and I haven't seen a case like
21 this -- but it would be where a prisoner says, I didn't
22 exhaust my administrative remedies and I have no excuse
23 for failing to do so, but please, district court, please
24 take mercy on me. And in that situation the district
25 court could say, there's absolutely no way you can

1 possibly prevail on the merits, so your claim --

2 JUSTICE BREYER: Probably the reason they do
3 this is that there are lots and lots of claims by
4 prisoners in Federal courts that are hard to decipher.
5 They don't know what it's about. They don't want to put
6 the defendant to the burden of coming in in every single
7 complaint when it's quite a good probability it's about
8 nothing. That's the kind of reasoning that would lead
9 to a rule like this. So -- and then you have the
10 statute and the statute says indeed there's a special
11 power here to dismiss if it's frivolous or it doesn't
12 state a claim or malicious.

13 So why isn't this just an exercise of the
14 Sixth Circuit's or a court's ordinary subsidiary
15 rulemaking powers? They're trying to figure out how to
16 manage their docket.

17 MR. ANDRE: The problem is that it conflicts
18 with Federal Rule of Civil Procedure Rule 8. And as
19 this Court this repeatedly said, including as recently
20 as last term in *Hill v. McDonough*, the Court will not
21 impose a heightened pleading requirement absent an
22 amendment to the Federal Rules of Civil Procedure.

23 JUSTICE BREYER: So your point would be that
24 they can do this if we amend the Federal Rules. If it's
25 a problem take it to the Rules Committee?

1 MR. ANDRE: I think that's correct. I think
2 that's correct, but if it --

3 JUSTICE SOUTER: If we amended the rules
4 that way, in effect it would no longer be an affirmative
5 defense. I mean, by definition an affirmative defense
6 gets raised by the defendant and so on, so if we amended
7 the Federal Rules in practical terms it would be like
8 adding an element to the claim.

9 MR. ANDRE: Right. Or if the Court were to
10 add PLRA exhaustion to the Rule 9(c).

11 CHIEF JUSTICE ROBERTS: But Rule 8 and the
12 normal rules weren't addressed to the unusual situation
13 under the PLRA where the district court has an
14 affirmative obligation screen on its own before the
15 defendant even gets involved. So if in fact, just to
16 follow on Justice Kennedy's hypothetical, 80 percent of
17 the cases have this exhaustion problem, why isn't this a
18 reasonable means of facilitating the screening
19 obligation?

20 MR. ANDRE: It may be a reasonable means,
21 but that doesn't necessarily mean that it's permissible,
22 because Congress had exhaustion in mind when it enacted
23 the PLRA and noticeably absent from all the PLRA
24 screening provisions is the term "exhaustion."

25 CHIEF JUSTICE ROBERTS: Well, but you just

1 told me earlier that if it was a case in which
2 exhaustion is required and not done that would be a
3 frivolous claim, and the statute does refer to frivolous
4 claims. So the district court or the Sixth Circuit has
5 just said, we know that in a large number of cases they
6 are going to be frivolous because they have ignored the
7 exhaustion requirement, and we just want to try to find
8 out which those cases are to fulfill the screening
9 obligation, which takes this out of the normal Rule 8
10 type of case.

11 MR. ANDRE: Right, I think I understand. I
12 think it goes back still to the fact that there's not a
13 clear Congressional expression to take these cases out
14 of the Federal Rules. In *Califano v. Yamasaki* we
15 believe is instructive on that point. In in that case
16 the Secretary of the Department of Health Education and
17 Welfare had argued that Section 205(g) of the Social
18 Security Act, which used the term "individual," somehow
19 took those, those judicial review procedures, out of the
20 operation of Federal Rule of Civil Procedure 23. This
21 Court said: No, we cannot read the word "individual" as
22 such a clear expression. It may have been Congress's
23 policy to have individual claims be addressed one by
24 one, but you have to find that clear expression in the
25 statute and that clear expression is not here.

1 JUSTICE ALITO: Well, what about 1997(e) and
2 (g), which prohibits, seems to prohibit a case from
3 getting beyond the complaint, not even to the answer
4 unless the district court finds that the plaintiff has a
5 reasonable opportunity to prevail on the merits.
6 Doesn't this clearly take this out of the normal
7 pleading procedures?

8 MR. ANDRE: I don't think so, Justice Alito.
9 We have exhaustively researched that language, the
10 reasonable opportunity to prevail on the merits 1997(g),
11 and the only courts that construe that language are
12 courts construing 1997(e) and (g), and they have
13 universally found that that provision simply summarizes
14 the other screening provisions' terms, so, frivolous,
15 malicious, fails to state a claim, or seeks -- from an
16 immune defendant. And we can't really think of what,
17 what else Congress would have had in mind because while
18 it's like the preliminary injunction standard it makes
19 no sense that Congress wanted a prisoner to satisfy a
20 preliminary injunction standard before requiring prison
21 officials to respond.

22 JUSTICE SOUTER: Would your answer be
23 different if amendment were allowed? I mean isn't the
24 problem in substance here, and I don't mean to dismiss
25 your arguments from the rules, but leaving the argument

1 from the text of the rules aside, it wouldn't be a real
2 problem here in substance if the circuit bar allowed
3 amendment, would it?

4 MR. ANDRE: I think if the circuit were to,
5 Sixth Circuit were to allow amendment it would certainly
6 mitigate the situation. It's our position that the
7 screening provisions can't overrule Federal Rule of
8 Procedure 15 either, but the problem we see with even
9 doing away with the no amendment rule, but keeping in
10 place the heightened pleading rule, is that we are
11 talking about prisoners. Prisoners who don't have a lot
12 of access to materials. They may have -- legal
13 materials. They may have great difficulty holding on to
14 their, their formally filed grievances.

15 JUSTICE GINSBURG: Mr. Andre, didn't you
16 have in one of that's cases that the exhaustion was
17 spelled out by the defendant, there was a complaint that
18 alleged exhaustion, generally but not in all detail.
19 Then the answer attached every piece of paper that came
20 up at all three levels of the grievance procedure, and
21 then the plaintiff said oh, that's a good idea, I'm
22 going to copy all those documents and make them my own.
23 And nonetheless, that case was dismissed for failure to
24 allege exhaustion in sufficient detail although the
25 record made it plain that there had been exhaustion.

1 The rule that you are opposing would operate that way.
2 If you don't allege exhaustion in detail, it doesn't
3 matter that the deficiency has been made up by the
4 answer. You go out. Wasn't that the decision in one of
5 these cases?

6 MR. GRANT: Yes. That was in Petitioner
7 Jones's case, and that -- Petitioner Jones's case is a
8 great example of how the heightened pleading rule and
9 the no amendment rule work together to result in a
10 prisoner being unable to cure any problem with his or
11 her initial complaint.

12 CHIEF JUSTICE ROBERTS: You talk about the
13 lack of statutory direction on the first two points but
14 there is a very explicit statute on the third question.
15 It says no action shall be brought until administrative
16 remedies are exhausted. And yet you say the action
17 should be allowed to be brought even if there are
18 unexhausted claims in the complaint.

19 MR. ANDRE: Well, I -- we concede that an
20 action that contains unexhausted claims or a mixed
21 action shouldn't have been brought in the first place,
22 but it's there. And the question then becomes what to
23 do about it. And the language no action shall be
24 brought; it's very common in administrative exhaustion
25 schemes, the Americans with Disabilities Act uses almost

1 identical language, the Immigration Nationality Act uses
2 very similar language, Title VII --

3 CHIEF JUSTICE ROBERTS: This is a very
4 different statutory scheme. This is designed to address
5 the problem of an overwhelming number of frivolous
6 complaints that result in the fact that meritorious
7 complaints can be overlooked. We've got a haystack in a
8 needle problem here. And if you allow the action to
9 continue, that doesn't do anything to reduce the number
10 of filing of claims that as you say should not have been
11 brought.

12 MR. ANDRE: I guess I should be clear at the
13 outset that we are by no means advocating that a
14 prisoner can shoe horn in unexhausted claims with
15 exhausted claims. So the unexhausted claims must go.

16 CHIEF JUSTICE ROBERTS: Well right, but you
17 provide under your approach no incentive for the
18 prisoner to leave those claims out. Instead what, a
19 screening function turns into an editing function. The
20 district court is supposed to just excise out the
21 unexhausted ones but allow the exhausted ones to
22 continue.

23 MR. ANDRE: Well, it's been our experience
24 and from reading the case law it appears that prisoners
25 don't intentionally try to shoe horn in unexhausted

1 claims with their exhausted claims. It's typically
2 based on innocent mistake, a simple failure to
3 understand either the particular circuit within which
4 they are housed, a difficulty in understanding that
5 circuit's exhaustion law, difficulty in understanding
6 the prison grievance procedures that they attempted to
7 comply with, and perhaps even being further confused by
8 the fact that prison grievance administrators seem to
9 apply prison grievance regulations, I don't want to say
10 in an ad hoc manner, but inconsistently. And so when
11 they bring these complaints that are mixed they actually
12 are intending to bring a fully exhausted complaint but
13 then after a little built of judicial review, it becomes
14 clear that they didn't exhaust.

15 JUSTICE BREYER: Why does it hurt if you
16 dismiss the whole thing? They could just refile.

17 MR. ANDRE: Well, it hurts for a couple of
18 reasons. Well -- and -- it hurts under the Sixth
19 Circuit's rule because they did not allow prisoners to
20 amend. So --

21 JUSTICE BREYER: No. No. What would happen
22 is you just dismiss the complaint.

23 So -- I guess again the reason they have
24 these things is they get a certain number of complaints,
25 they have no idea what it sys, to tell you the truth,

1 they don't know what the claim is, they don't understand
2 it, there are a lot of things written here; the person
3 wasn't represented; it's hard to make out. And for, the
4 judge thinks I have to go through all these papers; I
5 have to figure out if there is something here that was
6 exhausted, we know something happened; it was something
7 exhausted -- so the simplest thing is just dismiss it.

8 Now the prisoner can always refile it with
9 the parts that he has to now figure out were exhausted.
10 Now is -- and it doesn't hurt because, just refile it.

11 MR. ANDRE: It doesn't hurt if the --

12 JUSTICE BREYER: Is that true? Or what
13 happens?

14 MR. ANDRE: Well, I guess there is two
15 different versions of the total exhaustion rule as it's
16 termed. There is the Eighth Circuit's rule with is with
17 leave to amend. So the complaint is dismissed, and
18 prisoner can file a new complaint without the
19 unexhausted claims.

20 Then there is the Sixth Circuit's rule,
21 which is the most draconian of all the versions. And
22 that says the entire action is dismissed, prisoner must
23 institute a new action.

24 JUSTICE STEVENS: Why is that draconian?

25 MR. ANDRE: It's draconian because by the

1 time the prisoner refiles his or her action there could
2 be a statute of limitations problem. The prisoner may
3 not be able to bring those claims any more. In fact the
4 Fifth Circuit in --

5 JUSTICE STEVENS: Does he have to file a new
6 filing fee?

7 MR. ANDRE: Not in the Sixth Circuit
8 anymore, and not in the Fourth Circuit.

9 CHIEF JUSTICE ROBERTS: How many prisoners
10 pay the filing fee in the first place?

11 MR. ANDRE: I believe they all do. If they
12 qualify --

13 CHIEF JUSTICE ROBERTS: They are not
14 entitled to IFP status?

15 MR. ANDRE: If they get IFP status, all that
16 means -- well, first of all, they only get to do that
17 three times. Or to have three actions dismissed before
18 they lose their IP status.

19 CHIEF JUSTICE ROBERTS: Is that a draconian
20 rule, do you think? You have to have three actions
21 dismissed before you have to pay the filing fee?

22 MR. ANDRE: No, no, no. I mean -- but
23 that's not really at issue in this case. But even if
24 they qualify for IFP status they still have to pay the
25 \$350 filing fee. It's just taken out in installments.

1 And so for a prisoner who makes \$2.50 a day or \$2.50 a
2 week it -- it is costly for them to --

3 JUSTICE SCALIA: Well, I guess this is
4 probably not a question for you, but a question for your
5 friend on the other side. You can ask, why does it
6 hurt? You can also ask why does it help? What good
7 does it do to bounce the whole thing back when you're
8 just going to have them filed again?

9 MR. ANDRE: I think that's exactly right,
10 Justice Scalia.

11 JUSTICE BREYER: No, well, the reason it
12 would hurt is because it's difficult for the judge to go
13 through this complaint that he can't quite make sense out
14 of. And it puts the burden of the prisoner to go
15 through and figure out what he really wants to say.
16 That's why -- that's why it's easier for the judge just
17 to dismiss it than to go through many, what could be
18 many pages with a fine-toothed comb trying to figure out
19 if there is anything here that was exhausted.

20 CHIEF JUSTICE ROBERTS: And the other
21 incentive is if you adopt your rule, the incentive on
22 the prisoner is to put in every possible claim, even if
23 it is not exhausted because maybe it will get through,
24 maybe it won't. And if it doesn't get through, no harm.
25 He doesn't even have to pay another \$50.

1 MR. ANDRE: But I think at least, at least
2 under that scenario, the district court still only has
3 to take one look at the case and then it can move
4 forward, it deletes the unexhausted claims. So from a
5 judicial efficiency standpoint I think the Ortiz V.
6 McBride rule out of the Second Circuit, which is the
7 rule that we are advocating, is -- is the cleanest
8 approach. It takes the choice away from the prisoner;
9 it puts the choice with the district court, and it
10 allows the district court to delete off any unexhausted
11 claims. And in most instances --

12 JUSTICE KENNEDY: Is there any argument that
13 if the state does not insist on exhaustion or plead
14 exhaustion, that it just drops out of the case? If the
15 state resolves the case on the merits even though there
16 is no exhaustion, can the Federal court hear it, that
17 there is general agreement about that?

18 MR. ANDRE: I think there is. The circuit
19 -- the four circuits that we know were unanimous that
20 PLRA exhaustion is not jurisdictional, and in Woodford
21 we know this Court confirmed that. And so to the extent
22 that the PLRA exhaustion is an affirmative defense, then
23 it would operate like other exhaustion schemes in
24 administrative -- administrative law, and habeas, where
25 it is waivable by the other side.

1 JUSTICE GINSBURG: If -- if we accept your
2 first two arguments, then if there is no heightened
3 pleading rule and you don't have to name the specific
4 defendants in the administrative grievance that you end
5 up naming in the complaint, if you prevail on both of
6 those, then isn't the third question, have you, what
7 happens when you haven't properly exhausted, is really
8 not alive anymore in this case, because you will have
9 properly exhausted. So why should the Court go on to
10 answer what would happen if you hadn't properly
11 exhausted?

12 MR. GRANT: Respectfully, Justice Ginsburg,
13 it's unfortunately more complicated than that. If the
14 first question in the Jones case, the ID pleading rule
15 question, is resolved in favor of Petitioner Jones, then
16 total exhaustion is a live issue. Because the Sixth
17 Circuit as an alternative holding justified the
18 dismissal of Jones's complaint on the total exhaustion
19 ground. And I guess on the other side if the Court were
20 to resolve the identifying the defendant's issue against
21 Petitioner --

22 JUSTICE GINSBURG: But the Sixth Circuit
23 obviously would have been wrong; if he has totally
24 exhausted; they have, gave that as a no alternative
25 grounds, but if they are wrong on the first one and he

1 has exhausted. That's the end of it.

2 MR. GRANT: The Sixth Circuit -- and it's
3 not really clear from this opinion, because it's an
4 unpublished opinion, but the Sixth Circuit appears to
5 have adopted the magistrate judge's finding which is
6 based on respondent's motion to dismiss that Jones
7 substantively, for lack of a better word, didn't exhaust
8 all of his claims, so -- I'm sorry. I'm not being
9 clear.

10 JUSTICE GINSBURG: That was the case where
11 the, where the defendant estate, wasn't that the case
12 where they put in all the papers from the administrative
13 record?

14 MR. ANDRE: Yes. But they also argued that
15 Jones failed to exhaust his administrative remedies on
16 everything but his First Amendment retaliation claim.
17 Or what they termed his negative work --

18 JUSTICE GINSBURG: Yes, but they were wrong
19 about that. If, if there was exhaustion in the case,
20 and if there is no rule that you must name everything
21 the defendant that you end up suing, if those two are
22 established, again wouldn't we be dealing with a moot
23 question? Moot in this case?

24 MR. ANDRE: I don't think so, Justice
25 Ginsburg. I think in order for the total exhaustion

1 issue to be moot, the heightened pleading requirement
2 would have to be resolved against Petitioner Jones, and
3 the naming the defendants issue would have to be
4 resolved in favor of Williams and Walton. I charted out
5 on a matrix and verified it a couple of times.

6 Turning to the naming issue if I could,
7 since we haven't addressed that, the Prison Litigation
8 Reform Act simply sets a floor of how much specificity a
9 prisoner must provide in his or her grievance. It does
10 not require what the Sixth Circuit held here which is
11 that as a matter of Federal statutory law a prisoner
12 must have identified every individual who he or she
13 later sues in Federal court. This is a kind of endemic,
14 or flows logically from the Court's decision in Woodford
15 V. Ngo. Woodford v. Ngo says that prisoners must comply
16 with grievance procedures.

17 JUSTICE SCALIA: You would have no problem,
18 I assume, if the state simply requires that you name the
19 individuals?

20 MR. ANDRE: I guess broadly speaking no; in
21 certain cases yes.

22 JUSTICE SCALIA: To the extent possible, I
23 suppose.

24 MR. ANDRE: Right. Exactly. If -- in
25 Michigan they have a --

1 JUSTICE SCALIA: Then, then there would not
2 be exhaustion unless he had named the individuals.

3 MR. ANDRE: I believe that's correct. I
4 mean, although I guess --

5 JUSTICE SCALIA: So we may not be, may not
6 be litigating about a whole lot here.

7 MR. ANDRE: No, right. I think really the
8 question is an X or not X question. It's does the PLRA
9 as a matter of statutory law required individuals to be
10 named in the underlying grievances, and the PLRA is
11 entirely silent on that question, and this Court's
12 decision in Sims v. Apfel lends further lends further
13 support to the proposition that a Federal court cannot
14 go beyond what the particular administrative agency's
15 rules require. I realize that was a plurality decision
16 but I think the petitioners win under either the
17 plurality opinion or under Justice O'Connor's
18 concurrence. And so yes, Justice Scalia we agree with
19 you that it's simply an X or Y question that down the
20 road perhaps the Court could address the scenario where
21 a prison system amends its rules to require individual
22 defendants to be named and then perhaps a prisoner can't
23 comply with that based on the short previous filing
24 deadlines, and then there is a question of whether the
25 administrative remedies were actually ever available to

1 that particular prisoner.

2 JUSTICE GINSBURG: And you have in one of
3 these cases, the person has said: I didn't know who was
4 the person who said I couldn't have the operation until
5 the prison identified him.

6 MR. ANDRE: That's correct. I believe
7 you're referring to either the Williams or the Walker --

8 JUSTICE GINSBURG: Yes. So even if you had
9 a rule, a reasonable rule, that named the people that
10 you know, if you have it, that would not encompass
11 someone? In two of these cases, the defendants -- the
12 plaintiff, the prisoner, said, I didn't know who those
13 guys were until they were identified.

14 MR. ANDRE: Right. And to that extent the
15 prison grievance system worked, because the prisoners
16 provided as much detail as they possibly could and then
17 the prison grievance system went out, conducted its
18 investigation, broadened the universe of relevant facts,
19 and then made a determination. They happened to
20 determine that grievances were not meritorious.
21 Obviously, petitioners disagree with that assessment.
22 That's why they sued in Federal court.

23 But the prison grievance system worked. To
24 borrow from the Third Circuit's decision in *Spur v.*
25 *Gillis*, a cooperative ethos between inmate and jailer

1 was achieved, because so long as the prisoner provides
2 sufficient information for the grievance system to go
3 out and answer any unresolved questions and so long as
4 the prison grievance system avails itself of that
5 opportunity then the claim is exhausted.

6 If there are no further questions, I'd like
7 to save the rest of my time for rebuttal.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Andre.

10 Ms. Olivieri.

11 ORAL ARGUMENT OF LINDA M. OLIVIERI

12 ON BEHALF OF RESPONDENTS

13 MS. OLIVIERI: Mr. Chief Justice and may it
14 please the Court:

15 Congress enacted the Prison Litigation
16 Reform Act to deal with the flood of prisoner litigation
17 that was coming into the Federal courts, obscuring the
18 treatment for meritorious claims brought by all
19 litigants. The purpose of the act was to unburden the
20 courts from dealing with this flood of litigation that
21 largely was without merit. The purposes for the act
22 were to increase the quality of the litigation, decrease
23 the quantity of the litigation, allow the states to
24 address first the issues that the prisoners have
25 problems with and to develop an administrative record to

1 facilitate judicial screening. And all of this would
2 result in increased judicial resources for all
3 litigation that has potential merit.

4 The invigorated exhaustion requirement does
5 require total exhaustion. The statute, the words of the
6 statute itself confirm this. The statute states: "No
7 action shall be brought until" --

8 JUSTICE STEVENS: May I ask you, what is a
9 typical administrative record that is developed in these
10 proceedings? There's never a transcript, is there?

11 MS. OLIVIERI: I've never seen a transcript.
12 Typically it's one sheet of paper. The inmate states
13 what the problem is, states what he did to try to
14 resolve the problem before filing a grievance. And then
15 there's space at the bottom for response. Frequently
16 the response is right on that page. Sometimes the
17 response indicates "See attached." If there's a
18 lengthier response there may be a separate page.

19 Similarly, if the prisoner can't put all of
20 his --

21 JUSTICE STEVENS: Is there normally a
22 statement of reasons for the denial of relief or are
23 they just denied in many cases?

24 MS. OLIVIERI: For the most part they
25 attempt to address the issue.

1 JUSTICE STEVENS: Are the opinions a page or
2 two or just a sentence or two? What is typical?

3 MS. OLIVIERI: Typically they are --

4 JUSTICE STEVENS: I'm just wondering how,
5 how much help that will give the judge later on in
6 processing the case.

7 MS. OLIVIERI: In the last 12 months there
8 have been 13,000 grievances processed by the Michigan
9 Department of Corrections at the third step, and that's
10 for people who appeal all the way through to the third
11 step. So there are many more than that before that.
12 Some of the responses can be very detailed. They can go
13 on for a full page typewritten single spaced. Some of
14 the responses --

15 JUSTICE STEVENS: How many of the 13,000 are
16 of that variety?

17 MS. OLIVIERI: I haven't read all 13,000,
18 but typically the response would be about a half a dozen
19 lines.

20 JUSTICE STEVENS: I see. And the other
21 question: Of the 13,000 grievances, how many did result
22 in litigation?

23 MS. OLIVIERI: Last -- in the last year that
24 ended June 30th, 12 months, we had approximately 200
25 cases.

1 JUSTICE STEVENS: 200 out of 13,000?

2 MS. OLIVIERI: Correct. In the previous
3 years we had somewhat fewer, so it's sort of going up.
4 But you know, it's between 160, 180, 200. This year
5 we're on that same pace, approximately 200.

6 JUSTICE STEVENS: Can you explain what the
7 disincentive or other reasons for there being just 200
8 lawsuits out of the 13,000?

9 MS. OLIVIERI: These 200 are ones that we
10 were served with. That doesn't include the ones that
11 may have been screened out by the courts and we were
12 never served with them.

13 JUSTICE STEVENS: I see.

14 MS. OLIVIERI: This only includes ones where
15 a defendant was actually served with process.

16 JUSTICE BREYER: Basically, I mean you've
17 heard the question and so forth. It seems to me that my
18 questions and certainly others were based on certain
19 empirical premises that might be true, might not be
20 true. So why isn't this a question for the Rules
21 Committee? Why not go to the Rules Committee if this
22 really is a burden and so forth, rather than doing
23 something unusual, which is to make exhaustion something
24 other than an affirmative defense, to dismiss the whole
25 complaint, which appear to be rules that reached

1 draconian results in a few cases anyway.

2 MS. OLIVIERI: When it's a dismissal without
3 prejudice, it's improper to characterize it as
4 draconian.

5 JUSTICE BREYER: It could be, because the
6 statute of limitations could have run. So it depends.
7 Sometimes it is, sometimes it isn't. But my basic
8 question here, isn't this a matter for the Rules
9 Committees rather than for the Sixth Circuit to go off
10 on its own?

11 MS. OLIVIERI: This Court in *Neitzke* versus
12 *Williams* took a look at the previous version of the *in*
13 *forma pauperis* statute and that statute allowed *sua*
14 *sponte* dismissals for only two reasons, frivolous and
15 malicious cases. Under that, in that opinion, the Court
16 indicated that when it's a *sua sponte* review for those
17 two issues you don't get the benefit of the adversary
18 process that's embodied in the Federal Rules of Civil
19 Procedure. Congress, recognizing that even in *Neitzke*
20 the Court indicated that the Federal courts were being
21 flooded with prison litigation, much of it meritless,
22 expanded the categories that are now subject to *sua*
23 *sponte* dismissal, and those include suing someone who is
24 immune from liability or failing to state a claim.

25 JUSTICE GINSBURG: But that doesn't include

1 failure to exhaust.

2 MS. OLIVIERI: It didn't specifically
3 include failure to exhaust.

4 JUSTICE GINSBURG: And if you follow the
5 normal rule, that that's an affirmative defense, then,
6 then the burden would be on the prison to do just what
7 it did in the Jones case. Why, why would we say, depart
8 from the normal rule that makes exhaustion an
9 affirmative defense when we know that the party best
10 equipped to provide the information about exhaustion is
11 the prison, as the Jones case showed so well? They, the
12 prison, had all of the grievances. They had all of the
13 responses and they presented that to the court. So the
14 prisoner is less well equipped to attach those papers
15 than the prison is, so why isn't it not only traditional
16 to have exhaustion as an affirmative defense, but makes
17 the most sense because the one most likely to have the
18 information is the prison?

19 MS. OLIVIERI: Congress dealt with that in
20 1997e(g), the waiver of reply provision, which confirmed
21 what the 1997e(c) dismissal provision provides. This is
22 all a screening situation for the Federal district
23 courts, designed to move these cases that have been
24 proven largely meritless quickly through the system
25 rather than bogging the courts down --

1 JUSTICE GINSBURG: If Congress meant to
2 reverse the ordinary burden on pleading exhaustion, why
3 didn't it put that in? It was expanding the categories
4 and it included failure to state a claim, which had not
5 been there before, and it included if you sue somebody
6 who has got immunity. But it didn't include exhaustion,
7 so why should we read that in?

8 MS. OLIVIERI: Well, exhaustion is the very
9 first provision and it's --

10 JUSTICE GINSBURG: It's not in the
11 screening. It doesn't say you screen out for failure to
12 exhaust.

13 MS. OLIVIERI: It's not specifically there,
14 but the exhaustion provision is a precursor. It's a
15 precondition. You can't even get into court until
16 you've exhausted because it says no action shall be
17 brought.

18 JUSTICE GINSBURG: But there are other
19 provisions than "no action shall be brought." Take a
20 statute of limitations that reads "No action shall be
21 brought after two years" or something like that. There
22 is no action shall be brought. Does that make it no
23 longer an affirmative defense?

24 MS. OLIVIERI: The courts have interpreted
25 statutes of limitations consistently to be in the

1 category of an affirmative defense. The problem with
2 that is this statute, the PLRA, is the new regime for
3 prison litigation, not for all the litigation across the
4 board. And in the waiver of reply, the Congress
5 specifically took the defendant out of the equation,
6 requiring the court to determine whether or not the case
7 has been exhausted, whether or not the plaintiff has
8 failed to state a claim and the other criteria that are
9 all in that --

10 JUSTICE GINSBURG: Well, all the criteria
11 are there, but failure to exhaust is not.

12 MS. OLIVIERI: Not specifically, but failure
13 to exhaust could be construed as a --

14 JUSTICE GINSBURG: But last time -- and you
15 said before the statute was there were only frivolous
16 and malicious. And the court says, we can see from the
17 face of this complaint that it fails to state a claim,
18 too bad it's not a ground for automatic dismissal. So
19 Congress said, yes, it should be, and put that one in.

20 MS. OLIVIERI: Congress put the screening
21 provision as number one, where you cannot even bring a
22 case to court unless you have exhausted administrative
23 remedies. So it's unimaginable that that would not be a
24 ground for sua sponte dismissal when you can't even
25 bring your case until you've exhausted.

1 JUSTICE SCALIA: Miss Olivieri, you also
2 rely on the "no action shall be brought" language to
3 justify dismissal of the entire action, all claims, even
4 though only some of them have not been exhausted. Do
5 you have any, even a single example of the many other
6 instances where that language is used in the Federal
7 statutes? And there are many of them. Do you know any
8 other case where it's been interpreted that way, so that
9 claims that are perfectly valid will not be retained,
10 but rather the whole action will be dismissed?

11 MS. OLIVIERI: Habeas corpus is another
12 situation where there is a provision that says no relief
13 shall be granted, no writ shall be granted, absent
14 exhaustion of -- exhaustion of state court remedies.
15 There in the habeas situation, it is a little bit
16 different than in the PLRA -- pardon me -- because there
17 is a stay in abeyance provision in habeas --

18 JUSTICE SCALIA: Right.

19 MS. OLIVIERI: -- which was in the statute
20 before Congress passed the PLRA, and Congress actually
21 took out the stay in abeyance provision.

22 It all serves the purpose that Congress
23 intended, which was to allow the courts to quickly
24 screen these cases. If you look at e(a)(C)(1) --
25 (C)(2), they give the court many options for doing what

1 is most judicially prudent in that particular case to
2 preserve resources.

3 JUSTICE SCALIA: What is the basis in the
4 habeas context for dismissing the entire habeas
5 application despite the fact that some of the claims
6 have been exhausted? Is there any statutory basis for
7 that or is it just, just judicial efficiency?

8 MS. OLIVIERI: There is -- I believe it's
9 under the exhaustion requirement. The court has the
10 option of dismissing the entire action -- actually, I
11 believe there the petitioner gets the option, do they
12 want to proceed on the exhausted claims or do they want
13 to drop out the unexhausted claims.

14 JUSTICE GINSBURG: And that's not -- the
15 statute doesn't settle that. Our decisions settle that,
16 right? So why should we deal with that, the two, any
17 differently? It's not as though Congress wrote the
18 statute differently. We said you can't proceed with
19 unexhausted claims, so you have a choice. Either you go
20 out of the Federal court and exhaust everything -- or
21 even you don't have to go out; you could use the stay in
22 abeyance -- or you just lob off the unexhausted claims,
23 stay in the Federal court on the ones that you have
24 exhausted.

25 That's all made up by this Court. So why

1 should the Court react differently in the PLRA than it
2 did? Why should it fill those gaps differently than it
3 did in habeas?

4 MS. OLIVIERI: I think because Congress did
5 revoke the stay in abeyance provision in the PLRA.

6 JUSTICE SCALIA: But your answer was it
7 shouldn't, I think. I think she's making your argument
8 for you.

9 MS. OLIVIERI: Pardon me?

10 JUSTICE SCALIA: I think she is saying that
11 we should treat this area the same way we treat habeas,
12 so that the whole case should be dismissed rather than
13 just the individual claims, which is what I think you
14 want; isn't it?

15 MS. OLIVIERI: Yes, that is my argument,
16 yes.

17 JUSTICE SCALIA: Okay. Well, don't fight
18 it.

19 MS. OLIVIERI: Okay. I was suggesting that
20 in habeas it is the prisoner's option to say --

21 JUSTICE GINSBURG: I was suggesting that in
22 habeas it is the prisoner's option to say I don't want
23 the whole case dismissed. I will amend my petition so
24 that the court will have, will retain the exhausted
25 claims. You are saying not like habeas, I don't want it

1 to be like habeas, because if it were like habeas, the
2 prisoner would have the option to stay in the federal
3 court as long as he lopped off the unexhausted claims.
4 You don't want it. You don't want it to be like habeas?

5 MS. OLIVIERI: I don't want the prisoner to
6 be allowed to choose to lop off the unexhausted claims,
7 that is true, or to amend, to delete them, because then
8 there is absolutely no incentive for the prisoner to
9 improve the quality of the litigation by stopping and
10 thinking, being careful to exhaust all his claims, and
11 being careful to plead only claims that are exhaustive.

12 JUSTICE SCALIA: The same arguments apply in
13 habeas, don't they?

14 MS. OLIVIERI: But in habeas you have the
15 stay and abeyance provision that was specifically
16 removed --

17 JUSTICE SCALIA: Not if you had your way.

18 MS. OLIVIERI: Remove -- well --

19 JUSTICE SCALIA: I think you're making an
20 argument that it would preclude that too.

21 MS. OLIVIERI: Right.

22 JUSTICE SCALIA: So it seems to me that if
23 we accept your response to Justice Ginsburg, we've got
24 to go back and to the extent that we can do anything
25 about it, we'd better toughen up habeas so that these

1 things get thrown out more readily.

2 MS. OLIVIERI: Habeas does deal with a
3 person's liberty whereas the PLRA is simply dealing with
4 people basically for the most part trying to get some
5 sort of relief, either injunctive or monetary relief,
6 that does not deal with their basic freedom. So in that
7 respect --

8 CHIEF JUSTICE ROBERTS: One reason to
9 require total exhaustion is because, I would assume the
10 prisoner may get sufficient relief if the claims are
11 exhausted, that he doesn't feel the need to go forward
12 with litigation. But I guess that's only true if the
13 exhausted claims are still alive, and how many, when
14 we're talking about unexhausted claims, are those
15 typically claims that are not going to be available or
16 are they claims that may generate relief once there is
17 exhaustion?

18 MS. OLIVIERI: It could be -- I mean, it's
19 obviously both. I mean, there are claims that are
20 partially exhausted when the inmate files the lawsuit.
21 He may finish exhausting and get the relief that he's
22 looking for without ever pursuing the case in federal
23 court.

24 JUSTICE SCALIA: And then sometimes it's
25 impossible to complete the exhaustion. I assume in some

1 cases that the time limit for the last appeal will have
2 expired, right?

3 MS. OLIVIERI: That can also be the case,
4 and under Woodford versus Ngo, now that they have to do
5 proper exhaustion, there will be more of those cases
6 where it probably, there wouldn't be anything left to do
7 after it's dismissed except for the plaintiff to be the
8 one to go through the maybe 20 claimed complaints and
9 call out the claims that are not exhausted, rather than
10 putting that burden on the court, which is contrary to
11 Congress's purpose, to streamline this system.

12 JUSTICE STEVENS: May I ask you about,
13 there's another question you haven't really touched on
14 yet, the requirement that the prisoner name every
15 defendant that he intends to sue in the exhausting, in
16 the internal procedure. I'd just like a little help on
17 just exactly what happens. The prisoner doesn't get the
18 kind of medical care he thinks he's entitled to, and he
19 only knows it because either the low level person says
20 no, the doctors said you can't have it. And he brings a
21 proceeding, an informal administrative proceeding, and
22 they deny relief. And then later on when he wants to
23 sue, his lawyer happens to find out the name of the
24 doctor who was involved, and there are several levels of
25 authority making the decision. Does he have to start

1 all over again to name those people, or what does he do?

2 MS. OLIVIERI: Medical care is -- well, for
3 one thing, prisoners do have counselors, and so if
4 they're not sure who is responsible for something,
5 that's one of the things that they're supposed to do is
6 talk to their counselor to find out. You know, I'm
7 having this problem, I'm not getting surgery, why am I
8 not getting surgery, who do I talk to, who do I complain
9 to. So that's one way to resolve the problem.

10 JUSTICE STEVENS: And what if he does talk
11 to the prison guard and the guard says I don't know, I
12 don't know who's responsible for that decision, that's
13 in the warden's office, or something like that. What
14 is the prisoner supposed to do?

15 MS. OLIVIERI: If the prisoner makes inquiry
16 and just simply can't find out who it is, then he should
17 state that in his grievance and indicate that somebody
18 in the medical department is denying me the surgery.
19 You know, I talked to Dr. So and So, he's recommended
20 that I get it, somebody is saying no, I haven't been
21 able to find out who that is. And likely during the
22 grievance process, he will find out who it is, because
23 one of the responses will probably say that.

24 JUSTICE STEVENS: What if he doesn't? One
25 of his grievances is nobody told me. Is he out of luck

1 there? And I think there may well be situations in
2 which prisoners don't have complete access to all the
3 facts that go into a decision denying them medical care,
4 for example, or say a prisoner has a religious problem
5 and can't get the diet he wants, or something like that.
6 But before he can sue, under your view if I understand
7 it, he has to find out so he can name the people in his
8 administrative complaint.

9 MS. OLIVIERI: He has to make a good faith
10 attempt to find out. And if he really, you know, if he
11 says I've asked my counselor, he is not able to provide
12 me with that information, then he will get a response on
13 the grievance.

14 JUSTICE GINSBURG: What is the purpose of
15 that requirement? As long as he has made known in the
16 administrative proceeding what his problem is, and they
17 have had a chance to investigate it and determine
18 whether it has merit or not, why should he have to name
19 the individuals who made the decision in order, before
20 he can sue them when he later finds out who they are?

21 MS. OLIVIERI: That goes back to 1997e(g),
22 the waiver of reply, where it says that no defendant can
23 be made to respond to the complaint unless the court can
24 certify that the prisoner has a reasonable opportunity
25 to prevail on the merits. It talks about defendants

1 there. Also, you get a case like Mr. --

2 JUSTICE KENNEDY: Well, no, it's standard
3 law of agency. It doesn't make any difference. The
4 prisoner is denied his rights. As Justice Stevens said,
5 there may be three or four different people who
6 concurred. Do your rules say that if he can't find out
7 with reasonable efforts that he doesn't need to, or does
8 the Sixth Circuit rules say that the delegation of the
9 names is not required?

10 MS. OLIVIERI: The Sixth Circuit rule
11 basically says name or identify. And for instance, here
12 with respect to Mr. Jones, he didn't name the
13 classification director. He used the title. Nobody had
14 anything negative to say about that. We know you're
15 talking about the classification director. It's
16 Mr. Morrison. We've only got one, not a problem. The
17 Sixth Circuit rule is basically name or identify, so if
18 you're going to identify --

19 JUSTICE SOUTER: Why is it that the Sixth
20 Circuit rule requires the identification, for complete
21 exhaustion requires the identification to be made at the
22 first stage?

23 MS. OLIVIERI: The Sixth Circuit rule does
24 require that.

25 JUSTICE SOUTER: So to make sure I

1 understand this, in a case, let's say at stage one he
2 names Dr. X. And for whatever reason in the course of
3 the response perhaps, he learned that not only was Dr. X
4 involved but Dr. Y was involved in that decision. So if
5 he is denied relief at stage two, he says X and Y, and
6 he identifies X and why all the way through. He gets
7 nothing satisfactory to him, so he goes in to Federal
8 court. Is it correct that under the Sixth Circuit rule
9 they would say you have not completely exhausted because
10 at stage one you did not mention Y? Is that correct?

11 MS. OLIVIERI: The Sixth Circuit probably
12 would say that that he would be out of luck with respect
13 to Y.

14 JUSTICE SOUTER: What justification is there
15 for that? I mean, for two stages through the prison
16 administrative process, Y has been identified. The
17 prison has taken action on the merits on the assumption
18 that Y is in fact at least an allegedly responsible
19 party. What reason is there in a Federal court to say
20 that the exhaustion is incomplete because he didn't
21 mention Y back at stage one?

22 MS. OLIVIERI: The Sixth Circuit adopted
23 that rule probably in a case like the Walton case here,
24 where Mr. Walton had a problem with his slot restriction
25 and said, you know, Deputy Warden Bobo put this

1 restriction on me. It goes through the grievance
2 process and they say Bobo didn't put that on you, Gearin
3 put it on you. That's at step one. They give that
4 response. He goes then into court after exhausting two
5 or three steps, still saying, you know, they're
6 discriminating against me based on race with the slot
7 restrictions.

8 JUSTICE SOUTER: Yeah, but that wasn't my
9 hypo. As I understand it, in that case he keeps going
10 after Bobo, period. And in my case at stage two, having
11 learned something, he identifies Y. And I -- so I don't
12 see the justification, what is the justification?

13 MS. OLIVIERI: I think I was probably giving
14 too much explanation, but I think from my understanding
15 of how this should operate, he is all right in that case
16 to sue Mr. Gearin, who actually did put the slot
17 restriction on him, and he had the wrong name at step
18 one. No problem. We got the right name at step two or,
19 excuse me, at the end of step one. And he pursues it?
20 I think he's got a good claim against Mr. Gearin. The
21 Sixth Circuit may not think that's true.

22 JUSTICE SOUTER: In my case, you said you
23 understood that the Sixth Circuit would say that
24 although he identified X and Y in stage two and at stage
25 three, and there had been merit for adjudication at

1 those stages, understanding who the named respondents
2 were, the Sixth Circuit would nonetheless say you had
3 failed to exhaust because back at stage A you mentioned
4 X but not Y. What is the justification, if that is
5 still your answer, what could the justification for that
6 be?

7 MS. OLIVIERI: I don't think the Sixth
8 Circuit had that type of case in front of them when they
9 issued --

10 JUSTICE SOUTER: But that apparently, if I
11 understand your answer, is what the result would be.
12 And is there -- and I don't want to, you know, make it
13 hard for you. I think you're having a hard time finding
14 a justification for that result and I certainly can't
15 find one. Can you think of any?

16 MS. OLIVIERI: I'm saying there is none.
17 I'm saying he's got a good claim against Mr. Gearin.

18 JUSTICE SOUTER: Well, how about Y in my
19 example?

20 MS. OLIVIERI: Pardon me?

21 JUSTICE SOUTER: Does he have a good claim
22 against Y?

23 MS. OLIVIERI: Y?

24 JUSTICE SOUTER: In the Federal court in my
25 hypo --

1 MS. OLIVIERI: Okay. He named X, and now --

2 JUSTICE BREYER: I think Y is Mr. Gearin.

3 MS. OLIVIERI: Y is Mr. Gearin, yes.

4 JUSTICE SOUTER: Okay.

5 MS. OLIVIERI: So he's got a claim against
6 Y.

7 JUSTICE SOUTER: Even though the Sixth
8 Circuit would throw it out for failure to exhaust.

9 MS. OLIVIERI: I disagree with the Sixth
10 Circuit on that, but I don't disagree with the Sixth
11 Circuit in that when he actually got to court, he sued
12 four other people who were never mentioned in any
13 grievance by anybody.

14 JUSTICE GINSBURG: How about Jones, who
15 really did not know who was the doctor who said no
16 surgery? He didn't know and then the prison told him.
17 And he comes to the court, he says thanks, prison, for
18 telling me, and so he names that person in his
19 complaint. The Sixth Circuit said that's no good, he
20 didn't put it in his initial complaint. He had only 15
21 days to find out and he didn't find out.

22 MS. OLIVIERI: I'm agreeing with you that
23 the Sixth Circuit, both that the Sixth Circuit would say
24 that that won't fly, and that in fact it should fly.

25 JUSTICE GINSBURG: So Jones did properly

1 exhaust, then, if you just made that confession, then
2 Jones properly exhausted?

3 MS. OLIVIERI: Jones properly exhausted
4 against the doctor who actually denied the medical
5 treatment, denied the surgery. Yes. But Jones never
6 served, unfortunately, that particular doctor,
7 Dr. Cranstall.

8 CHIEF JUSTICE ROBERTS: Counsel, you've
9 mentioned in your brief that there has been a change in
10 the Michigan grievance policy with respect to naming
11 individuals. What is the consequence of that change for
12 our ability to address that claim?

13 MS. OLIVIERI: It will, it will be the same
14 basic philosophy that I've been stating here. I mean,
15 it's going to be a name or identify. Tell us who you've
16 got a problem with. Don't tell us you have a problem
17 with one person and then go into court and sue six other
18 people who may be the people who actually responded to
19 the grievance, because MDOC didn't know that you had a
20 problem with this person.

21 CHIEF JUSTICE ROBERTS: I thought one of the
22 objections to the Sixth Circuit rule from your friend
23 was that this requirement of naming the individuals came
24 out of thin air. And now we have that requirement
25 articulated in the grievance policy. Does that make a

1 difference?

2 MS. OLIVIERI: It does make a difference in
3 proper exhaustion.

4 JUSTICE GINSBURG: It's not an absolute
5 policy, though. It isn't that if you haven't named him
6 in the first administrative step, you can't name him in
7 the complaint. That's not Michigan's new policy.

8 MS. OLIVIERI: Michigan doesn't say you have
9 to name him at the first step. It says when you file
10 your grievance, you know, name --

11 JUSTICE GINSBURG: Isn't there an exception
12 when you couldn't find out?

13 MS. OLIVIERI: And if they say they can't
14 find out, and they've made reasonable inquiry, you know,
15 there's somebody at the top of the chain of the medical,
16 that's understandable that they may not know, because
17 they may have never seen Dr. Pramstaller.

18 CHIEF JUSTICE ROBERTS: Did the Sixth
19 Circuit have the current Michigan policy before them
20 when they made their decision?

21 MS. OLIVIERI: Not on these three cases, no.
22 It was the previous policy which indicated that the
23 inmate had to be as specific, basically be as specific
24 as possible, something along those lines.

25 JUSTICE SOUTER: I take it from your answer

1 to Justice Ginsburg that back in my Dr. X, Dr. Y case,
2 under the new policy if they got to stage 2 and Y was
3 identified, that Michigan would process the complaint?

4 MS. OLIVIERI: We would process the
5 grievance, absolutely.

6 JUSTICE SOUTER: The grievance.

7 MS. OLIVIER: Yes. Yes. Finally, I would
8 ask the Court to keep in mind that the entire purpose of
9 the Prison Litigation Reform Act is to relieve the
10 courts of the burden and the screening process that's
11 set in place by this statute allows the Court many
12 options.

13 JUSTICE STEVENS: Now you say the primary
14 purpose is to relieve the courts of the burden rather
15 than determine whether there is merits to the
16 grievances?

17 MS. OLIVIERI: The, the purpose of the
18 Prison Litigation Reform Act was to relieve --

19 JUSTICE STEVENS: Was to reduce the volume
20 of litigation, period?

21 MS. OLIVIERI: To reduce the volume to
22 provide more --

23 JUSTICE STEVENS: Wasn't there any interest
24 in determining whether the complaints have merit? I
25 mean, I think you must be interested in getting rid of

1 11,000 complaints and reducing them down to 200. I
2 would think that's more important than saving the court
3 some time. There must be, you must have some interest
4 in determining whether the complaints have merit.

5 MS. OLIVIERI: Well, we do have an interest.
6 We respond to every one of those in three steps, and we
7 never end up in litigation for the most part so the
8 grievance process works totally outside of what
9 litigation goes on. It does resolve complaints. But
10 the Prison Litigation Reform Act allows the court to
11 either --

12 JUSTICE STEVENS: But these rules that are
13 challenged here are primarily to benefit the courts, not
14 the profits-- the process.

15 MS. OLIVIERI: They are to, to benefit the
16 courts by taking resources that had previously been
17 spent on meritless cases and spending those instead on
18 cases with merit, to efficiently screen these cases so
19 that the courts are not spending a lot of time asking us
20 for responses and so forth. If it's a failure to state
21 a claim the case can be dismissed right, there all
22 without prejudice. There is nothing draconian here.
23 They can be rebrought.

24 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

25 MS. OLIVIERI: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Andre, you have
2 five minute remaining.

3 REBUTTAL ARGUMENT OF JEAN-CLAUDE ANDRE,
4 ON BEHALF OF PETITIONERS

5 MR. ANDRE: Justice Ginsburg, you asked
6 earlier about who is better equipped to plead and show
7 exhaustion. It's certainly our position that the
8 Michigan Department of Corrections or prison grievance
9 administrators are absolutely better equipped to do so.

10 CHIEF JUSTICE ROBERTS: How is that? The
11 prisoner is the one who presumably knows best whether or
12 not he filed a grievance or not.

13 MR. ANDRE: The prisoner may know best
14 whether or not he or she filed a grievance and whether
15 or not he appealed. The prisoner may not know precise
16 dates on which he or she did so or have copies of the
17 grievances anymore. This really kind of brings the
18 heightened pleading rule, not just whether it's just
19 affirmative defense or a general pleading rule, to the
20 fore. Prisoners are prisoners. They get moved around,
21 they get put in administrative segregation; they are
22 subject to repeat searches; they have great difficulty
23 in maintaining possession of their belongings. On the
24 other hand the Michigan Department of Corrections keeps
25 copies of all the grievances, denials and appeals.

1 CHIEF JUSTICE ROBERTS: This seems to me to
2 be a stretch to say that the prison, which has how many
3 prisoners under their jurisdiction, is in a better
4 position to know in individual cases, an individual
5 prisoner, what this prisoner did or didn't do with
6 respect to the grievance process. Surely the prisoner
7 is in the best position. He knows what he did or at
8 least what he is going to allege.

9 MR. ANDRE: He may be able to aver generally
10 but with specificity there are many cases in which he
11 won't be able to. But the Michigan Department of
12 Corrections' policy directive makes clear that it has to
13 maintain these records for future FOIA requests, and in
14 many institutions it has to track them in a computer.
15 And as Justice Ginsburg pointed out, in the Jones case,
16 they were quite able to bring forward the proof of
17 exhaustion that would satisfy, that would have satisfied
18 the court that Jones had exhausted his administrative
19 remedies.

20 Jones gets, just got thrown out of court,
21 essentially, in a game of "gotcha," because he hadn't
22 attached his complaint in the first instance. I think
23 most importantly, from a judicial efficiency standpoint,
24 making exhaustion an affirmative defense makes sense.
25 That means that the lawyers in the state attorney's

1 general, in the state, in the office of the state's
2 attorneys general, are going to be able to put forward
3 the best arguments as to why a claim is or is not
4 exhausted.

5 JUSTICE SCALIA: It requires, it requires
6 response in all the cases, and as this subsection G
7 indicates, part of the purpose of the act was to
8 eliminate the necessity of responding to frivolous
9 complaints. Why -- why, you know, you have to go
10 through the requesting a response from the government,
11 when in fact there is nothing to this complaint because
12 there has never been any exhaustion.

13 MR. ANDRE: But to go back to Justice
14 Ginsburg's point earlier Congress could have included
15 unexhausted claims among those types of claims that the
16 court could screen out and dismiss or among those claims
17 for which a court could --

18 JUSTICE SCALIA: That's a different
19 argument. But I mean, don't tell me that it isn't more
20 efficient to have the prisoner say at the outset whether
21 it's exhausted or not. It certainly is.

22 MR. ANDRE: Or again, it may be more
23 efficient to have them aver generally, but as far as
24 having a prisoner comply with a heightened pleading
25 requirement, we don't think that that makes sense. We

1 are talking, again we are talking about prisoners here.

2 JUSTICE ALITO: If it's an affirmative
3 defense doesn't that mean that the prisoner is going to
4 have to file, and the individuals defendants are going
5 to have to file an answer in every case and assert all
6 of their defenses?

7 MR. ANDRE: Either --

8 JUSTICE ALITO: Just respond, even if there
9 is nonfrivolous, nonexhaustion argument that can be
10 made, they are going to have to go through all of that
11 in every instance?

12 MS. OLIVIERI: They would have to file an
13 answer and motion to dismiss raising whatever
14 affirmative defense they want to raise, but at least it
15 gives them a choice and gives them the opportunity to
16 frame this argument as opposed to putting it on, putting
17 that burden on the court. Moreover if the court were to
18 adopt respondents' reading of the screening provisions,
19 those screening provisions would swallow up every single
20 affirmative defense enumerated in the Federal rules, and
21 also those not enumerated.

22 CHIEF JUSTICE ROBERTS: With respect, with
23 respect to the naming of the individuals, is that claim
24 moot because of the change in the policy?

25 MR. ANDRE: Oh, not at all. I mean, I can't

1 see how, how respondents could argue that --

2 CHIEF JUSTICE ROBERTS: I thought your main
3 argument before was they invented this requirement
4 without any basis, but now it's an actual requirement in
5 the grievance procedure.

6 MR. ANDRE: Right, but it wasn't when these
7 claims were decided. And that's where I think *Sims v.*
8 *Apfel* comes into play. Under Justice Thomas' plurality
9 opinion, the key is looking at kind of the nature of the
10 proceedings and if it's informal and accusatorial as
11 opposed to adversarial, then a court cannot impose a
12 requirement beyond that which the agency itself required
13 at the time that the claims were before the agency.

14 Under Justice O'Connor's concurrence, she
15 was concerned about fair notice, and certainly here in
16 these cases petitioners Williams and Walton didn't have
17 fair notice that a year and a half later the State of
18 Michigan, after going through the entire grievance
19 procedure and never relying on their failure to be
20 sufficiently specific, can then come into Federal court
21 and say, aha --

22 CHIEF JUSTICE ROBERTS: Future prisoners now
23 do have fair notice because the grievance procedure says
24 name the individuals, dates, names, places, names of all
25 those all involved.

1 MR. ANDRE: Yes, they would, they would.
2 And again, there would certainly be constraints to too
3 rigid enforcement of that particular provision.

4 JUSTICE GINSBURG: Is the no leeway built
5 into the rule itself, that if you don't know --

6 MR. ANDRE: I'm sorry. I didn't --

7 JUSTICE GINSBERG: Isn't there -- the
8 current rule, isn't there some leeway for cases where
9 the prisoner simply doesn't know the names?

10 MR. ANDRE: I'm not aware of any, Justice
11 Ginsburg.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case is submitted.

14 (Whereupon, at 12:06 p.m., the case in the
15 above-entitled matter was submitted.)

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